Supreme Court, U. S.
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No. 74-1564

In the Supreme Court of the United States

OCTOBER TERM, 1975

VINCENT J. BERNABEI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of willful failure to file individual income tax returns for 1965 through 1968, in violation of 26 U.S.C. 7203. He was fined $20,000 and sentenced to a term of four years' imprisonment, all but four months of which was suspended on the condition that he pay the fine within three years. The court of appeals affirmed (473 F.2d 1385), and this Court denied certiorari and rehearing (414 U.S. 825, 1052).

Nineteen months after he was convicted and sentenced, and almost one year after the court of appeals affirmed his conviction, petitioner moved for a new trial on the ground of newly-discovered evidence that the jury panel had not been selected in accordance with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, *et seq.*, and the district court's local jury plan promulgated pursuant to that Act. After a hearing, the district court denied the motion and the court of appeals dismissed the appeal (Pet. 3; Pet. App. 1a-5a).

At the hearing on petitioner's motion for a new trial, Mrs. Agnes E. Haas, the jury clerk and sole witness, testified that she selected the jury panel from a box, or qualified jury wheel, that held 100 to 150 prospective-juror cards. These cards previously had been chosen at random from the district court's master wheel. Mrs. Haas selected at random 41 cards, each of which contained, *inter alia*, the name, address, and prior jury service record of a prospective juror. In selecting the cards, she eliminated no more than three cards of jurors who had served previously in criminal cases presided over by the trial judge. However, no prospective juror cards were excluded for any other reasons. The individuals whose cards were selected, and 19 other veniremen whose cards previously had been drawn from master and qualified jury wheels in the same manner as the 41 cards, were notified to report for jury service (Pet. App. 2a; R. 22-23).[1]

1. Petitioner bore the burden of proving that the manner of selecting the jury panel deprived him of his constitutional right to a fair and impartial trial. See, *e.g.*, *Whitus* v. *Georgia*, 385 U.S. 545, 550; *Tarrance* v. *Florida*, 188 U.S. 519, 520; *Foster* v. *Sparks*, 506 F.2d 805, 819 (C.A. 5); *United States* v. *De Alba-Conrado*, 481 F.2d 1266, 1270 (C.A. 5); *United States* v. *Ware*, 473 F.2d 530, 537 (C.A. 9).

In denying petitioner's motion for a new trial, the district court correctly held that he had "failed to either plead or prove a prejudicial systematic exclusion" because "[n]o evidence was adduced at hearing on this issue" and that such an exclusion could not "be inferred from the evidence that was presented" (Pet. App. 3a). Petitioner did not claim or prove that any cognizable class or group qualified for jury service had been excluded from the list of veniremen. There is no basis for petitioner's claim that the method of jury selection deprived him of his constitutional right to a fair trial.

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[1] "R." refers to the record appendix in the court of appeals.

2. Petitioner's claim under the Jury Selection and Service Act of 1968 is untimely. His motion for a new trial was filed 19 months after his conviction (Pet. App. 1a). Under 28 U.S.C. 1867(a) he was required to raise the issue "before the voir dire * * * or within seven days after * * * [he] discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever * * * [was] earlier * * * ." The procedures prescribed by that provision are "the exclusive means by which a person accused of a Federal crime * * * may challenge any jury on the ground that such jury was not selected in conformity with the [Act's] provisions * * * ." 28 U.S.C. 1867(e). The district court therefore correctly held that "as a matter of law * * * [petitioner was] precluded from challenging the jury panel selection on the grounds that it did not conform to the Act" (Pet. App. 2a). See *United States* v. *De Alba-Conrado, supra*, 481 F.2d at 1269; *United States* v. *Silverman*, 449 F.2d 1341, 1344 (C.A. 2), certiorari denied, 405 U.S. 918; *United States* v. *Greene*, 489 F.2d 1145, 1148 (C.A.D.C.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.